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Utah Supreme Court

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LET NO. 7942 A

IN THE SUPREME COURT
of the
STATE OF UTAH

THE STATE OF UTAH by and
through its Treasurer,

Plaintiff and Appellant,

vs.

SPRING CITY, a municipal corpora-
tion, and HYRUM JENSEN, its
mayor, CLAUDE ACORD, ROYAL
ALLRED, CUTLER SCHOFIELD,
HENRY SCHOFIELD and VIR-
GUS OSBORNE, its councilmen,
and CHARLES A. THOMPSEN,
ROYAL ALLRED, VIRGUS OS-
BORNE, MAX BLAIN, LOWELL
HANSEN, ALLEN BECK and
HENRY BLAIN,

Defendants and Respondents.

APPELLANT'S REPLY BRIEF

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7942

APPELLANT'S REPLY BRIEF

STATEMENT OF POINTS

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2. If a portion of the bonds are declared invalid, plaintiff and appellant should have judgment for all bonds not in excess of the constitutional maximum.

ARGUMENT

POINT I.

THE DEBT LIMIT IMPOSED BY ARTICLE XIV, SECTION 3, CONSTITUTION OF UTAH, WAS NOT EXCEEDED.

1. The debt was valid when created; subsequent expenditures could not invalidate it. The debt may be floated from the year in which incurred to a subsequent year or years.

The respondent, Spring City, having elected to rely solely upon the provisions of Section 3, Article XIV, of the Utah State Constitution to conclude the unconstitutionality of the disputed bond issue, the appellant in its reply addresses itself solely to that proposition, and as to other issues upon which this appeal is based, appellant will rely upon its arguments in the original appeal brief.

In asserting the validity of the bonds under Section 3 of Article XIV the appellant maintains that as of January 15, 1948, the time the obligation of Spring City was created and assumed, the debt was valid and constitutional because potential current revenues had not been expended or appropriated. Respondent at page 9 of his brief states that there is no evidence before the court that the 1948 expenditures of Spring City were not regular operating expenses. With respondent's position in respect thereto we must necessarily take issue particularly in light of the cases and conclusions in the exhaustive note

in A.L.R. Vol. 159, which at page 1263 says:

"The rule appears to be well settled that when a municipality * * * has created a contractual indebtedness which at the time of its creation is not in excess of the amount which it may reach under the constitutional limit of taxation or which may reasonably be anticipated, the indebtedness cannot thereafter be invalidated by the governmental subdivision by making expenditures for other purposes in excess of its revenue for the year."

Numerous cases therein cited uphold that theory. In *Carl R. Miller Tractor Company v. Hope*, 218 Iowa 1235, 257 N.W. 312, it is said:

"It seems certain that the limit of valid expenditure is reached when the note or collectible revenue is equaled and from then on all expenditures are within the ban of the statute. * * * It seems certain that if expenditures during any year were in excess of collectible revenues, the county auditor could not go back in a year and select certain items for rejection and thus reach a position in which obligations subsequently incurred could validly be paid and the prior items selected for rejection be invalidated * * *."

Another important case cited, *Buxton S. Stationery Company v. Craig County*, 53 Okla. 65, 155 P. 215, states:

"An ordinary debtor may incur indebtedness in excess of his ability to pay and he may pay debts in such order as he chooses; but a county cannot incur valid obligations exceeding in any one year the income and revenue provided for such year * * * but it is far from being a matter of indifference if invalid claims founded upon void contracts are paid before valid claims found-

ed upon valid contracts. Parties entering into contracts with a county are bound to take notice of constitutional limitations and to ascertain as to what extent the revenues have been appropriated to existing liability; but they are not bound to anticipate and no amount of prudence or foresight would enable them to foresee that illegal claims would be incurred by officers willing to violate the constitution."

The note of the editor goes on to say:

"It seems to be a general rule that a provision against a governmental subdivision exceeding in any year its current revenue does not prevent it from paying a claim out of the revenue of a year subsequent to that in which it was incurred, if the contract on which the claim is based was valid when it was made."

In *Nelson County Fiscal Ct. v. McCrocklin*, 175 Ky. 199, 194 S.W. 323, the court said:

"After a particular debt has been incurred, the county cannot incur other debts for current expenses not indispensably necessary to the maintenance of the county government, and include such subsequent debts in its estimated liabilities for the purpose of defeating the prior debt in question.

"* * * Suppose the county, after contracting for a new vault for the county clerk's office, should decide to dispose of the old furniture and purchase new furniture for the courthouse. In determining whether the debt for the new vault exceeded the revenue and income for the year in which it was incurred, the salaries of the county officers for the entire year must be taken into consideration, for they are fixed charges which

must be met at all hazard. But the debt subsequently incurred for the new furniture should not be included for the debt is not indispensably necessary to the maintenance of the county government."

How may respondent Spring City rely as it does upon the lack of evidence in the record to show that 1948 expenditures were not "regular operating expenses" when the cases clearly hold that even regular operating expenses subsequently incurred or paid may not invalidate a pre-existing valid debt? The burden of proof to show that required and fixed expenditures have, as of the time of assumption of a disputed debt, been in excess of revenues for the current year is upon the defendant. Certainly on January 15th, the date of the issue now considered, expenditures for the year could not have exceeded potential revenues for that year, and the defendant is required to affirmatively plead and prove any fixed charges which must be anticipated during the remainder of the year. Rule 8 (c) U.R.C.P. requires illegality, as an affirmative defense, to be pleaded as such. 20 Am. Jur., p. 142, Evidence, Sec. 137 says:

"As to affirmative defenses asserted by the defendant, he is the actor and hence must establish the allegations of such defenses."

Sec. 143 at p. 149 of the same volume says:

"The burden of proving illegality or invalidity is upon the party who alleges it. The law will not presume illegality in the execution of a contract or other document. Where the defendant confesses in effect the cause of action alleged by the plaintiff but seeks to avoid it by setting up

illegality or invalidity he has the burden of proving such defense."

If, as the respondent implies, the record is silent on this matter, then the evidence does not support the findings and judgment of the lower court.

We renew our argument that the critical factor in determining constitutional validity of bonds is the time the debt is created or assumed. On January 15th the "taxes for the current year" within the meaning of Section 3 of Article XIV were still available for the satisfaction of a debt such as the one here disputed.

If the debt limit had not as of that time been exceeded, then by authority of *Muir v. Murray City*, 55 Utah 368, 186 P. 433, it is immaterial that the time for payment was provided to be in a year or years subsequent. See also 159 A.L.R. at page 1267 (the italicized material on page 4 of this brief) to the same effect.

In *Tuggle v. City of Barboursville*, 294 Ky. 351, 171 S.W. 2d 1008, a floating indebtedness was adjudged to be valid under constitutional restrictions similar to those in this state. In that case, a city council was declared to have authority to fund city obligations, valid when created, the satisfaction of which was prevented by a failure of current revenues to meet the city's necessary obligations created subsequent to and the debts which were funded. In that case the city ordinance passed September 4, 1942, provided for the issuance of four percent (4%) bonds to the amount of \$33,000.00, the last to mature in 1962. The same constitutional objections were interposed to that issue as have been set up here by the defendant and respondent. In that case the court said:

"The record shows that the indebtedness sought to be refunded was incurred for the purposes and in the manner stated and that being valid obligations at the time within the purview of sections 157 and 158 of the constitution there is nothing * * * which would prevent a holding that the proposed issue is valid."

For the court's consideration, a material portion of section 157 of the Kentucky Constitution provides:

"No county, city, town, taxing district or other municipality shall be authorized or permitted to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year without the assent of two-thirds of the voters thereof * * *."

It must certainly be said that the improvements procured through the flotation of this disputed issue were necessary and required expenditures of the year. The express recitation in the authorizing proceedings stated that there was an "immediate, imperative and pressing need of raising funds to the amount of \$12,000.00 for the purpose of extending and improving the power and light plant to be owned and controlled by the city." The resolution further recited that "\$12,000.00 may be raised at this time without incurring any indebtedness or liability by said city in excess of the revenue of said city for the current year 1948." (Plaintiff's Ex. B [resolution authorizing bonds] P. 2). Under the authority of Sections 10-8-2, 10-8-6 and 10-8-14, Utah Code Annotated 1953, the city council had express power and authority to make all the material findings upon which that recitation was based and to procure the flotation of indebt-

edness which is now disputed. If necessary obligations arising subsequent to that flotation had exhausted taxes and revenues anticipated, then under authority of the *Tuggle* case and the *Muir* case, supra, city officials would be entitled to float this indebtedness over to years subsequent to the year in which incurred.

Upon that basis we renew our argument that a different rule would demoralize presently valid and binding obligations known as tax anticipation notes or bonds, for this reason: that a tax anticipation note is valid if there are unexpended revenues or potential revenues available to meet it at the time the note was executed and delivered. Subsequent diversions could deprive the holder of the note or bond of his payment under a rule sought by the respondent. The holder has no lien, garnishment or encumbrance upon taxes anticipated and could not protect himself by enjoining public officials from appropriating the taxes when collected for purposes other than for the satisfaction of his claim. It is this type of diversion to which we most particularly object, a diversion impliedly covenanted against by the city officials of Spring City.

2. If a portion of the bonds are declared invalid, plaintiff and appellant should have judgment for all bonds not in excess of the constitutional maximum.

C.J.S., Vol. 64, P. 506, Sec. 1914 says:

“Where the limit of indebtedness has not been previously reached, bonds which in the aggregate exceed the limit are void only to the extent of excessive issue.”

43 Am. Jur., P. 290, Public Securities and Obligations, Sec. 26, states:

“It is well settled that an over-issue of bonds by a political subdivision—that is, where a portion of the bonds, although not all of them, is in excess of the amount authorized or the debt limit—does not affect the validity of an entire issue of bonds but only those in excess of what is authorized.”

If this court adopts the view that a bondholder is required to take notice of certain fixed charges which would cut down the borrowing power when that power is measured by current revenue, then we submit that there is nothing in the record which would show fixed charges which in the aggregate would cut down current revenues to leave a tolerance of less than \$13,498.67 as of January 15th; and that as of that date Spring City officials had an autonomous borrowing potential of \$13,498.67. The burden of showing the contrary is upon defendant and respondent. The record discloses that it has failed in this respect. However, in the event this court is of the opinion that fixed charges of which any purchaser or holder must take notice are shown by the record to have limited that borrowing power, then the case ought to be reversed and remanded for further proceedings for the purpose of determining to what extent, exactly, the sum of \$13,498.67, added to those fixed charges, together with expenditures made between January 1st and 15th, had exceeded the revenues realized by Spring City in the year 1948. 64 C.J.S. P. 503, Municipal Corporations, Sec. 1911, provides:

“Some statutory limitations refer only to the amount of bonds or stock which are issued at any one time or within any one fiscal year, but other charter or statutory limitations, by their express terms, or the constructions placed thereon, are applicable to the aggregate bonded indebtedness of the municipality, or the aggregate amount of its outstanding stock. Whether a limitation of bonded indebtedness is exceeded by a particular issue of bonds must be determined as of the time of the actual issuance of the bonds, and not as of a prior date when the bonds are authorized by popular vote, or a subsequent date, such as the date when the bonds are payable, or a date when the tax valuations are lower.”

The case most highly emphasized in respondent's brief of *Fritch v. Board of Commissioners of Salt Lake County*, 15 Utah 82, 87 P. 1026, defines “debt” as being an obligation incurred during a year whether for goods or services or other expenses customarily to be incurred in the administration of government. Even under the *Fritch* case we fail to see how the constitutional provision “no debt in excess of taxes for the current year shall be created” could have any reference to *existing* indebtedness. Constitutional elements are to be construed as meaning that which the framers and individuals who drew and ratified the constitution believed and intended them to mean. In determining the meaning of specific provisions it is proper to consider the wording and phraseology of other related provisions contained in the same document and historically contemporary. It is to be noted that Section 4 of Article XIV, supplementing Section 3, places a maximum of debt with respect to

“existing indebtedness.” It is conceivable that a municipality might be authorized under Section 3 to borrow a sum greater than permitted by Section 4, and the purpose of Section 4 is to limit *aggregate* debt to a percentage of taxable property values, in cutting down other authorizations.

Clearly an obligation created in years past is not created in the year in which it or installments thereon are to be paid. To create a debt within the meaning of Section 3, Article XIV is to incur a liability, whether paid presently upon receipt of the goods or service, or protracted as to its satisfaction to future years. We do not feel, however, that a municipality may be said to have created a debt within the current year when in that year they do no more than make a payment upon existing indebtedness. Upon that hypothesis a municipality in any given year may, without a bond election, create debt equal to the revenues for that year, and revenues are not to be diminished by payments which are made upon prior existing indebtedness, for the reason that Section 3 places a maximum upon debts *created within the year* and Article 3 of Section 14 does not contemplate *existing debt*. The framers of the constitution fixed a maximum of *aggregate* debt in the following section, Section 4. In the instant case the critical year of 1948 reflects payments upon existing debt of \$9,725.68. In our opinion that amount should not be included as a “debt created in the current year” and that amount should not be a direct diminution of the amount fixed as a maximum by Section 3 of Article XIV for the creation of debt without bond elections.

Particularly appropriate is this argument when the respondent in its brief at page 7, paragraph 1, even goes so far as to imply the *illegality* of some of the previous issues upon which installments were paid. In our original appeal brief we questioned the validity of a \$5,000.00 "tax anticipation note" (page 16 of appeal brief) which was paid in the year 1948 and treated by the lower court as "debt created within the year" in cutting down the borrowing power of Spring City to that extent. We respectfully submit that the plaintiff and appellant ought to be given judgment in any event to the extent by which the revenues within the year 1948 exceeded the expenditures of the year 1948, exclusive of \$9,725.68 which was spent by the city on retirement of debt existing from previous years.

Defendant and respondent has raised the question of failure to provide for the payment of interest upon the bonds and failure to provide a sinking fund for their retirement. C.J.S., Vol. 64, page 512, Municipal Corporations, Section 1918, provides:

"A municipal corporation may and sometimes must, prior to the issuance of bonds, make provision for the payment of such bonds and interest thereon; but in the absence of such requirement the failure to provide for the payment of interest and to create a sinking fund does not affect the legality of the bonds."

We find no constitutional or statutory conditions precedent to the validity of bonds which would require the provision of a sinking fund or a provision for the payment of interest on the bonds, prior to issue.

CONCLUSION

In summary we respectfully contend that the bonds are valid in all respects, having been issued at a time when they, together with previously incurred liability within the year and fixed charges for the year, did not exceed anticipated revenues for the year. That having been valid when created, no subsequent action by Spring City could invalidate them, and that under the *Muir* case and *Tuggle* decision cited, provision could be made for their satisfaction in future years.

We respectfully contend that if, after assumption of this debt, Spring City exceeded its revenues for 1948, then only the over-issue is void, and in computing the over-issue, no consideration should be given to fixed charges which consist of debts created in previous years.

At this point we wish to renew the previous arguments set forth in the original appeal brief in our contention that if the bonds in whole or in part be declared void, then the plaintiff and appellant ought to recover upon quantum meruit.

Respectfully submitted,

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